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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1105

JOSEPH CLINTON MCBRIDE, PETITIONER

v.

WILLARD SMITH, COMMANDANT, UNITED STATES COAST GUARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 1a–24a) is reported at 248 F. Supp. 459. The opinion of the court of appeals (Pet. App. 25a–32a) is reported at 369 F. 2d 65.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 1966. The petition for a writ of certiorari was filed on March 1, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(i) (1964).

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the Magnuson Act, 64 Stat. 427 (1950), as amended, 50 U.S.C. 191 (1964), and the applicable regulations (33 C.F.R. 6.10–1, 6.10–3, 6.10–9, and 121.01–121.29) are set forth in Appendix C to the petition, pp. 33a–53a.

QUESTIONS PRESENTED

1. Whether the Magnuson Act, 50 U.S.C. 191, authorizes the creation of the Coast Guard's merchant seamen's screening program here involved.

2. Whether the regulations pursuant to which the Commandant acted in this case satisfy the constitutional requirements of definiteness and procedural due process.

3. Whether the evidence—which shows that petitioner was long an active and knowing member of the Communist Party—supports the Commandant's denial of a special validation endorsement of petitioner's merchant mariner's document on the ground that he was not satisfied that petitioner's "presence on board vessels of the United States would not be inimical to the security of the United States" within the meaning of 33 C.F.R. 6.10–1 and 121.25.

STATEMENT

1. On July 10, 1959, petitioner applied to the Commandant of the Coast Guard to have his merchant mariner's document "specially validated" (J.A. 117a).[1] Together with the application, petitioner re-

[1] The Coast Guard issues merchant mariner's documents to those who wish to seek employment on commercial vessels flying the United States flag. Apart from the screening program here

turned a printed questionnaire, filled in by him, which called for disclosure of past and present membership in designated [2] organizations, including the Communist Party. Petitioner stated only that he had been a member of the International Workers Order (J.A. 119a–21a). By letter of October 15, 1959 (J.A. 122a), the Commandant informed petitioner that additional information was required in order to determine petitioner's eligibility for a specially validated document. Enclosed with the letter were detailed interrogatories, the answers to which petitioner executed on March 29, 1960 (J.A. 124a–128a). In his answers, petitioner acknowledged membership in the Communist Party from 1938 through 1950. He denied Party membership for all other years (J.A. 124a). In addition, petitioner admitted the following: employment at Communist Party Headquarters from 1948 to 1959 (J.A. 127a); participation in the 1951 and 1952 May Day Parades in New York City (J.A. 124a); participation in the 1942 Communist Party election campaign (J.A. 124a); registered affiliation with the American

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in question, the documents serve to identify seamen, who are not required to carry passports. In addition, a merchant mariner's document shows the seaman's rating and qualification for certain positions aboard ship, such as engineer, mate, and the like, ratings determined by a seaman's experience and by results of tests administered by the Coast Guard as part of a broad program to insure the safety of merchant vessels and crew. See also, pp. 17–18, *infra*.

References ("J.A.") are to the parties' joint appendix in the court of appeals. We are also lodging the administrative file, which was also presented to the courts below.

[2] "Designated" by the Attorney General under Executive Order 10450, 18 F.R. 2489.

Labor Party from 1949 through 1954 (J.A. 125a); signing a nominating petition for Elizabeth Gurley Flynn in her 1957 campaign for the New York City Council (J.A. 126a); attendance in 1957 at the New York State Communist Party convention (*ibid.*), and other Communist Party conventions (*ibid.*).

By letter of November 23, 1960 (J.A. 107a–112a), the Commandant notified petitioner that he was not satisfied that petitioner's presence on board vessels of the United States would not be inimical to the security of the United States. The Commandant listed 25 reasons for his conclusion (*ibid.*), all relating to petitioner's activity and membership in the Communist Party and other groups "subversive or disloyal to the United States" (J.A. 107a). The Commandant's letter informed petitioner of his right to file an answer and to request a hearing, which petitioner did on December 22, 1960 (J.A. 114a–115a).

2. A hearing was held on November 28, 1962, and May 14, 1963. The Hearing Board consisted of a civilian hearing examiner in the employ of the Coast Guard, a labor representative, and a management representative (J.A. 101a–105a; see 33 C.F.R. 121.13). Both petitioner, through his counsel, and the government presented witnesses and exhibits and had the right of cross-examination. A summary of the relevant evidence follows.

Petitioner, a Negro, was born in Florida in 1911, and during his childhood had three years formal education at a Bible school (J.A. 79a). He came to New York in 1932, and in 1936 joined the Communist Party (J.A. 81a, 82a). After having joined the Party,

petitioner learned to read and write under the tutelage of a Party member (J.A. 84a, 96a). In the late 1930's, he attended the "Daily Worker School known as the Jefferson School" for four or five weeks (J.A. 84a).[3] There he was taught the principles of Marxism and Leninism as well as "how to bring about a solution to the Negro question" (J.A. 85a). At the school, petitioner attended lectures by various Communist Party leaders and teachers (J.A. 85a). He was given various Communist publications to study (J.A. 85a–86a).

In 1948, petitioner began working as an elevator operator and night watchman at Communist Party Headquarters; the employment continued through August 4, 1960 (J.A. 89a, 90a). One of petitioner's two character witnesses (see pp. 7–8, *infra*), testified that petitioner left the job when the realty company that held title to the premises "went out of business or gave up the building or something" (J.A. 68a). However, petitioner's employment at Communist Party Headquarters apparently required membership in the Party (J.A. 37a, 90a).[4] Petitioner explained that the Party continued to employ him beyond 1957, the year in which he claimed to have left the Party

[3] See *Jefferson School of Social Science* v. *Subversive Activities Control Bd.*, 331 F. 2d 76 (C.A. D.C.).

[4] Petitioner testified (J.A. 89a–90a):

> Q. How long did you work at 35 E. 12th Street?
>
> A. Eleven years.
>
> Q. You quit when? A. On August 4, 1960.
>
> Q. Did you have to be a member of the Communist Party in order to hold a job there? A. The whole ninth floor was the National Committee for the Communist Party.

* * * * * *

(J.A. 90a), because only his group branch knew that he had ceased being a Party member (J.A. 90a–91a). Petitioner admitted attending Communist Party Club meetings during the late 1940's and early 1950's (J.A. 129a). Sometime subsequent to 1941 he became a member of the Waterfront Section of the Party (J.A. 89a). He attended Communist Party state and national conventions as late as 1957 (J.A. 91a, 126a). He adhered to the Party position against United States involvement in the Korean War (J.A. 94a–95a), and was employed by the Party for two months in 1950 in organizing a peace demonstration for May Day 1950 (J.A. 97a).[5] In addition, petitioner signed various nomination petitions for Communist Party members (J.A. 124a, 126a), and attended Communist Party camps where lectures were regularly given in Communist doctrine (J.A. 125a–127a; 53a–55a).

Petitioner testified that while a Party member, he learned that the Communist Party advocated the overthrow of the present form of government in this country (J.A. 87a–88a).[6]

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[5] Petitioner also participated in the May Day Parades in New York City in 1951 and 1952 (J.A. 124a). He testified that his activities for the Party included general political work, picketing, passing out leaflets, selling the *Daily Worker* and working at rallies (J.A. 83a).

[6] Petitioner qualified his adherence to the Party's views, as follow (J.A. 87a–88a):

> Q. Did you learn that the Communist Party advocated the overthrow of the present form of government? A. Yes.
>
> Q. And you, of course, were a member? A. I was at one time.
>
> Q. Would [you] have participated in such a revolution? A. Would I? It is hard to say. To tell you the truth it is

Petitioner testified that he had joined the Party and had remained in it solely because "the Communists * * * were supposed to help the cause of the Negro" (J.A. 82a). He said he left the Communist Party in 1957 because "the Communist Party was not alert and on the ball on the Negro question" (J.A. 83a). He also testified, however, that he first became disenchanted with the Party during World War II (J.A. 86a), and again in 1951 (J.A. 130a), but did not leave the Party until the John Gates schism occurred in 1957 (J.A. 92a, 130a).[7] He further testified that when he did leave, "I didn't change my ideas [about the Party]" (J.A. 93a), but rather left it because it was "not interested in the Negro question as far as I could see" (*ibid.*).[8]

At the hearing, petitioner presented two character witnesses. The first, Patricia Mae Buitoni, stated that she knew petitioner well since 1947 (J.A. 62a); her

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hard to say what I think now and what I thought then. It is hard to say.

Q. If the Communists did start a revolution what would you do? A. Go on the side of the Americans.

Q. Would you fight against the Communists? A. Of course I would.

[7] John Gates was a member of the National Committee of the Party and Editor of the Daily Worker. On January 10, 1958, he broke with the Party reportedly because he felt it had ceased to be an effective force in the United States and was too subservient to foreign powers. See N.Y. Times, Jan. 11, 1958, p. 1, col. 5; Hoover, *Masters of Deceit* (1958), 77, 165.

[8] At the hearing petitioner was asked: "Do you today participate in any NAACP or CORE meeting in this area?" He answered: "No more than go to meetings. I go to some of the outdoor meetings when I get the chance. I also make donations." (J.A. 99a.)

testimony tended to support that of petitioner as to his reasons for being a member of the Party, and as to the fact that he had terminated his membership (J.A. 63a). The second character witness, Ed Woodhead, testified that he first met petitioner late in 1959 or early 1960 in a neighborhood bar (J.A. 70a, 76a). He attested that petitioner had told him he had joined the Party because it "seemed to offer an answer for this problem [of prejudice against Negroes]" (J.A. 71a). However, Woodhead's knowledge of petitioner was almost wholly confined to conversations with him during occasional meetings at the bar (J.A. 76a–77a, 87a).

Petitioner was a merchant seaman until 1948, when he married and decided not to return to sea (J.A. 89a). His rating on board ship was "[s]tewards department, messman, assistant cook, second cook, baker" (J.A. 98a).

3. On October 14, 1963, the Commandant denied petitioner's application for special validation endorsement of his merchant mariner's document, on the ground that he was not satisfied that petitioner's "character and habits of life are such as to authorize or warrant the belief that your presence on board a merchant vessel of the United States would not be inimical to the security of the United States" (J.A. 32a). He based this conclusion on a finding that "[f]or more than twenty years, beginning in 1936 when you joined the Communist Party, you were knowingly and sympathetically associated and affiliated with the Communist Party as demonstrated by your active participation in the Communist Party and

in Communist Party-inspired organizations and activities" (J.A. 29a). The Commandant further stated to petitioner that "you were well indoctrinated in and fully realized, accepted, and approved the aims and objectives of the Communist Party, including the overthrow of the present form of Government in the United States by force and violence and Communist domination of the World" (J.A. 32a). In his decision, the Commandant listed, as supporting reasons, the various activities in which petitioner had acknowledged participation (J.A. 29a–32a).

The Commandant did not credit petitioner's testimony that he joined the Communist Party because he thought the Communists would help the cause of the Negro. He stated that petitioner's testimony "that in the 1940's and again in 1951 you became disillusioned with the Communist Party because you felt 'they were not alert and on the ball on the Negro question' is negated by your continued association with and participation in the Communist Party and its activities long afterwards" (J.A. 32a).

The Commandant also did not credit petitioner's testimony that he left the Communist Party in 1957. The basis for his disbelief lay in the fact that petitioner was employed at Communist Party Headquarters from 1948 to 1960, and that the record showed (see J.A. 37a, 89a–90a) that such employment would not have been available to a non-Communist (J.A. 31a).

The Commandant informed petitioner that he had the right to appeal his decision within twenty days (J.A. 32a–33a). Petitioner did so appeal, but waived

the right to appear personally or by counsel before the Appeal Board, electing to rely on the record below. The Appeal Board recommended affirmance of the Commandant's decision, and the Commandant, on March 3, 1964, adhered to his decision (J.A. 34a). The present suit followed.

The district court dismissed petitioner's complaint, holding that the Commandant acted "reasonably and properly" in denying special validation of petitioner's merchant mariner's document (Pet. App. 24a; 248 F. Supp. 459). The court of appeals affirmed (Pet. App. 25a–32a; 369 F. 2d 65).

ARGUMENT

1. The Magnuson Act, 50 U.S.C. 191 (Pet. App. 33a–34a), provides *inter alia,* that whenever the President finds that the security of the United States is endangered by certain events, including "subversive activities," he "is authorized to institute such measures and issue such rules" as necessary: (a) to take full possession and control of vessels and to remove any person not specifically authorized by him to go or remain aboard if in his opinion it is necessary to prevent damage or injury to a vessel, any harbor, or waters of the United States, or to secure observance of rights or obligations of the United States, and (2) to safeguard against destruction, loss or injury from sabotage or other subversive acts, vessels, harbors, ports and waterfront facilities.

Pursuant to this Act, the President issued Executive Order 10173, 15 F.R. 7005, on October 18, 1950. Having found that the security of the United States

was endangered by reason of subversive activities, he promulgated certain regulations, one of which authorized the Commandant of the Coast Guard to require every person employed on a merchant vessel of the United States to have a merchant mariner's document bearing a special validation endorsement for emergency service. The Commandant was empowered to prescribe the forms, contents and manner of issuance, to revoke or require surrender of such validated endorsement, and he has implemented his authority through further regulations (see 33 C.F.R. 6.10–1, 6.10–3, 6.10–9, and 121.01–121.05).

Under these regulations, the Commandant must decide whether he is satisfied that "the character and habits of life" of the applicant are such as to warrant the belief that his presence on board vessels of the United States "would not be inimical to the security of the United States" (33 C.F.R. 6.10–1, 121.25). The regulations set out procedures for the handling of applications for special validation endorsement, including the right to a hearing and appeal at three levels. Section 121.03 of the regulations sets out as "standards" certain categories of relevant information which "may preclude" a favorable determination to the applicant. These include acts of the applicant such as (a) advocacy of the overthrow or alteration of the government of the United States by unconstitutional means; (b) commission of or attempts to commit, espionage, sabotage, sedition or treason; (c) performing, or attempting to perform, duties or otherwise acting so as to serve the interests of another government to the detriment of the government of the

United States; (d) deliberate unauthorized disclosure of classified defense information; (e) membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons designated by the Attorney General pursuant to E.O. 10450, as amended. These standards do not purport to be all-inclusive, and the Commandant may consider any such information along with other information relevant to the question whether the applicant's presence aboard a vessel would be inimical to the security of the United States.

Every court that has considered the question has held that the Magnuson Act authorizes the screening program outlined above (compare Pet. 28), although the early decisions found some procedural deficiencies in the former regulations. See, *e.g.*, *Graham* v. *Richmond*, 272 F. 2d 517, 521 (C.A. D.C.); *Parker* v. *Lester*, 227 F. 2d 708, 715 (C.A. 9);[9] *United States* v. *Gray*, 207 F. 2d 237, 241 (C.A. 9); cf. *United States* v. *Aarons*, 310 F. 2d 341 (C.A. 2). Thus, Congressional authorization for the program is not only, in the words of the court below (369 F. 2d at 69), "quite plain" from the broad language of the Act and its legislative history,[10] but, also, it is an issue now well-settled.

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[9] Following the decision in *Parker* v. *Lester*, the regulations were amended to insure that the applicant receive a fair resumé of the information adverse to him and an adequate hearing in which to challenge that information.

[10] See 96 Cong. Rec. 10794–10795 (July 21, 1950) (remarks of Senator Magnuson); S. Rep. No. 2118, 81st Cong., 2d Sess. (1950). See also, Brown and Fassett, *Security Tests for Maritime*

2. Petitioner also contends that the regulations are unconstitutionally vague (Pet. 26–28), and that the program is otherwise infirm because it "departs so substantially from traditional norms of fair procedure" (Pet. 29).

a. As we have pointed out, the regulations require that the Commandant satisfy himself from "the character and habits of life of the individual," that the latter's presence on board a vessel would not be "inimical to the security of the United States." One factor the Commandant may consider is the applicant's "[m]embership in, or affiliation or sympathetic association with" any organization on the so-called Attorney General's list. The Commandant has construed his regulation, as indeed its language clearly connotes, to require "knowing" rather than "mere" membership, in order to be considered as adversely affecting the individual's application for a document. In that light, the regulations are sufficiently definite to withstand petitioner's attack, which the court below properly termed "not well taken" (369 F. 2d at 69).[11]

As the Court of Appeals for the District of Columbia Circuit said in reference to a similar screening program also administered by the Coast Guard (for radio-telegraph operators in the merchant marine), one which uses a similar standard—"character," "habits of life," and "suitable and safe person"—

Workers: Due Process Under the Port Security Program, 62 Yale L.J. 1163, 1188 (1953). Since the Act was passed as an emergency measure during the Korean crisis, its legislative history is limited.

[11] See also *Aptheker* v. *Secretary of State*, 378 U.S. 500, 511.

> Other important public affairs are administered under statutory language no more precise, such as a finding of "public interest, convenience and necessity," or "restraint of trade," or "unfair methods of competition." While these examples do not relate to matters of individual liberty, they are, on the other hand, more indefinite than the criteria of the present statute.

Homer v. *Richmond,* 292 F. 2d 719, 723 (C.A. D.C.).

The regulations may not set forth a "neat, mathematical formulary," *Dennis* v. *United States,* 341 U.S. 494, 515, but they sufficiently and fairly inform both those administering the program and those who seek to challenge any adverse determination. See *American Communications Assn.* v. *Douds,* 339 U.S. 382, 412; *Killian* v. *United States,* 368 U.S. 231, 258.

b. Nor is there merit to petitioner's complaint that the procedure prescribed is inadequate (Pet. 29). We think it clear that there is no lack of due process in the scheme. An application is first considered by the Commandant. Should he deny it, the application is, if requested, considered by a Hearing Board, and the applicant is given the opportunity to offer evidence in a hearing at which he may present witnesses and at which he is afforded the rights to confrontation and counsel. That Board makes an independent recommendation to the Commandant. Should the latter adhere to his decision, the applicant may appeal to an Appeal Board, which may conduct an additional hearing, following which it similarly makes a recom-

mendation to the Commandant. The court below held (369 F. 2d at 68):

> "Procedurally, there is no lack of due process in the statutory scheme, with opportunity to present evidence and cross examine adverse witnesses before the Boards, determination by the Commandant at each stage * * *."

In our view, that holding was clearly correct, and does not warrant further review.

3. Petitioner further contends (Pet. 20–25) that he may be denied special validation of his mariner's document only if it is shown that he has a specific intent to further the illegal objectives of the Communist Party or has personally participated in the organization's illegal activities. But his reliance upon *Elfbrandt* v. *Russell*, 384 U.S. 11, *Aptheker* v. *Secretary of State*, 378 U.S. 500, and apparently upon *Scales* v. *United States*, 367 U.S. 203, and *Noto* v. *United States*, 367 U.S. 290, is misplaced. All of those cases involved in effect penal statutes. *Scales* and *Noto* were prosecutions under the membership clause of the Smith Act, 18 U.S.C. 2385, which the Court, to avoid constitutional difficulties, construed to apply only to "knowing" and "active" membership in the Communist Party, accompanied by "specific intent". *Aptheker* concerned Section 6 of the Subversive Activities Control Act of 1950, 50 U.S.C. 785, which provided that when a Communist organization is registered, or under final order to register, it shall be unlawful for any member, with knowledge or notice thereof, to apply for or use a passport.[12] The court

[12] The maximum punishment for a violation of Section 6 was $10,000 and five years imprisonment. 50 U.S.C. 794(c).

held Section 6 unconstitutional on its face because it lacked the "knowing," "active," and "specific intent" elements. In so holding, the court pointed to "the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application" (378 U.S. at 516).[13] In *Elfbrandt,* the court dealt with an Arizona statute which provided that a public employee required to take an oath to support the federal and State constitutions and the State laws was subject to prosecution for perjury and to discharge from office if he "knowingly and wilfully becomes or remains a member of the communist party of the United States or its successors or any of its subordinate organizations" or "any other organization" having for "one of its purposes" the overthrow of the State government where the employee had knowledge of the unlawful purpose. The court, citing *Scales, Noto* and *Aptheker,* held the statute unconstitutional because it did not require a specific intent to further the illegal action of the organization.[14]

To be sure, this Court's recent opinion in *Keyishian* v. *Board of Regents,* 385 U.S. 589, makes clear, as *Elfbrandt* and *Aptheker* also indicate, that the presence or absence of a criminal penalty in the statutory scheme, or its application, is not the sole touchstone for decision. But the vice of the statutory scheme held invalid in *Keyishian* was the "impermissible over-

[13] Quoting from *NAACP* v. *Button,* 371 U.S. 415, 433.

[14] The court noted (384 U.S. at 18, 19) that a penal statute touching rights protected by the First Amendment must be "narrowly drawn to define and punish specific conduct * * *" (quoting from *Cantwell* v. *Connecticut,* 310 U.S. 296, 311).

breadth" and "vagueness" of its "regulatory maze," through which the individual teacher was forced to transude (385 U.S. at 609, 599, 604). No such objections can be made to the merchant marine screening program. Moreover, the statute involved in *Keyishian* made mere membership in the Communist Party prima facie evidence of disqualification. In contrast, it is hardly to be contested that petitioner here was an active and knowing member of the party, for as the court below held (369 F. 2d at 68):

> The evidence amply supports the Commandant's finding:
>
> 'that you [petitioner] were well indoctrinated in and fully realized, and approved the aims and objectives of the Communist Party, including the overthrow of the present form of Government in the United States by force and violence * * *.'

From the inception of the Nation, shipping has been a matter of great governmental concern, stemming from the importance of seapower as an agency of commerce and of national defense. Every aspect of shipping, including ship construction, preparation of ships for service, and procurement and qualifications of personnel, is closely regulated. See Gilmore and Black, *The Law of Admiralty,* 778–782 (1957). Quite naturally, the government—which regulates and subsidizes shipping, and provides training facilities for shipping personnel, see 46 U.S.C. 1126—will seek to assure the safety of shipping from subversive activity. Reasonable preventive measures must be taken to that end, among them the denial of clearance to seamen who, like petitioner, have held long and mean-

ingful membership in the Communist Party. To require a showing of specific intent to further the unlawful aims of the Party would seriously impair the effectiveness of the program.[15] We submit that the decisions upon which petitioner relies do not require that result.[16]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

J. WALTER YEAGLEY,
Assistant Attorney General.

KEVIN T. MARONEY,
LEE B. ANDERSON,
Attorneys.

MAY 1967.

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[15] We note also that *Elfbrandt* and *Keyishian* involved quite direct restrictions upon the dissemination of ideas—upon academic freedom, which this Court in *Keyishian* termed "a special concern of the First Amendment" (385 U.S. at 603). Doubtless, the denial of access to limited areas of employment affecting the national security might have, in some cases, a deterrent effect upon the free expression of ideas, but it cannot be considered that kind of wholesale infringement involved in *Elfbrandt*, *Keyishian*, and to a lesser extent, *Aptheker*, in all of which "less drastic" alternatives were available.

[16] Our position here is quite similar to that in *United States* v. *Robel*, No. 83, this Term; see the government's brief in that case, pp. 40–48. Should *Robel* be affirmed, this case we submit follows *a fortiori*. However, should the Court hold that the criminal prosecution in *Robel* is constitutionally infirm for failure to include the element of specific intent, discrete arguments may be available to support the preventive program here at issue.

U.S. GOVERNMENT PRINTING OFFICE: 1967